

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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NEILL SAMUELL,

Plaintiff,

v.

DOMINICK CIPRIANO, et al.,

Defendants.

Case No. 3:14-cv-00056-MMD-VPC

ORDER ACCEPTING AND ADOPTING  
REPORT AND RECOMMENDATION OF  
MAGISTRATE JUDGE  
VALERIE P. COOKE

**I. SUMMARY**

Before the Court is the Report and Recommendation of United States Magistrate Judge Valerie P. Cooke (dkt. no. 70) ("R&R") relating to Defendants Dominick Cipriano, Brian Fortner, and Joshua Taylor's ("Officer Defendants") motion for summary judgment ("Officer Defendants' Motion") (dkt. no. 60) and Defendant Melody Molinaro's ("Molinaro") motion for summary judgment ("Molinaro's Motion") (dkt. no. 59). Plaintiff and the Officer Defendants filed objection to the R&R (dkt. nos. 71, 72). The Officer Defendants subsequently supplemented their objection to include an affidavit to authenticate exhibits attached to their objection. (Dkt. no. 74.)

**II. RELEVANT BACKGROUND**

This case involves alleged conduct arising in connection with Plaintiff's custody at the Clark County Detention Center ("CCDC") for about a year period between January 27, 2012, and January 2013. (Dkt. no. 5.) After a preliminary screening of Plaintiff's complaint pursuant to 28 U.S.C. § 1915A(b), the Court permitted Plaintiff to proceed on two claims against Defendants in their individual capacities for deliberate indifferent to his serious medical needs (as articulated in Count IV) and use of

1 excessive force, and dismissed the remaining claims without prejudice and with leave  
2 to amend. (Dkt no. 4.) Plaintiff did not timely amend his complaint.

3 The excessive force claim is based on Plaintiff's allegations that the Officer  
4 Defendants twisted Plaintiff's wrist and arm while handcuffing him and made him stand  
5 outside in boxer shorts in cold weather. (*Id.* at 5.) The deliberate indifference claim is  
6 based on Plaintiffs' allegations that (1) the Officer Defendants refused his request to  
7 bring his eyeglasses and prescription eye drops for glaucoma with him at the time of  
8 the arrest; and (2) Defendant Molinaro ordered the CCDC medical department to deny  
9 him glaucoma medication until January 10, 2013, after an outside physician verified  
10 his condition and thereafter refused to approve the purchase of prescription  
11 eyeglasses. (*Id.* at 4-5.) Molinaro was the CCDC's Health Service Administrator. (Dkt.  
12 no. 59-5 at 2.)

### 13 **III. LEGAL STANDARD**

14 This Court "may accept, reject, or modify, in whole or in part, the findings or  
15 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a  
16 party timely objects to a magistrate judge's report and recommendation, then the court  
17 is required to "make a *de novo* determination of those portions of the [report and  
18 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). In light of the  
19 parties' objections, the Court has engaged in a *de novo* review to determine whether  
20 to adopt Magistrate Judge Cooke's recommendations.

21 "The purpose of summary judgment is to avoid unnecessary trials when there is  
22 no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of*  
23 *Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when  
24 "the movant shows that there is no genuine dispute as to any material fact and the  
25 movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); see *Celotex*  
26 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is "genuine" if there is a sufficient  
27 evidentiary basis on which a reasonable fact-finder could find for the nonmoving party  
28 and a dispute is "material" if it could affect the outcome of the suit under the governing

1 law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where reasonable  
2 minds could differ on the material facts at issue, however, summary judgment is not  
3 appropriate. See *id.* at 250-51. “The amount of evidence necessary to raise a genuine  
4 issue of material fact is enough ‘to require a jury or judge to resolve the parties’  
5 differing versions of the truth at trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902  
6 (9th Cir. 1983) (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-  
7 89 (1968)). In evaluating a summary judgment motion, a court views all facts and  
8 draws all inferences in the light most favorable to the nonmoving party. *Kaiser Cement*  
9 *Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

10 The moving party bears the burden of showing that there are no genuine issues  
11 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In  
12 order to carry its burden of production, the moving party must either produce evidence  
13 negating an essential element of the nonmoving party’s claim or defense or show that  
14 the nonmoving party does not have enough evidence of an essential element to carry  
15 its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*,  
16 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s  
17 requirements, the burden shifts to the party resisting the motion to “set forth specific  
18 facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The  
19 nonmoving party “may not rely on denials in the pleadings but must produce specific  
20 evidence, through affidavits or admissible discovery material, to show that the dispute  
21 exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do  
22 more than simply show that there is some metaphysical doubt as to the material facts.”  
23 *Orr v. Bank of Am. NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita*  
24 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). “The mere  
25 existence of a scintilla of evidence in support of the plaintiff’s position will be  
26 insufficient.” *Anderson*, 477 U.S. at 252.

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1 **IV. DISCUSSION**

2 **A. The Officer Defendants' Motion**

3 The Magistrate Judge recommends denying the Officer Defendants' Motion with  
4 respect to Plaintiff's deliberate indifference claim because their briefs do not address  
5 this claim. The Officer Defendants ask the Court to permit them to raise arguments in  
6 support of summary judgment on this claim for the first time in their objection. The  
7 Court has discretion, but is not required, to consider new arguments raised for the first  
8 time in a party's objection to a magistrate judge's ruling." *Brown v. Roe*, 279 F.3d 742,  
9 7444-46 (9th Cir. 2002). The Officer Defendants offer no good reason for their failure  
10 to raise their arguments in their Motion, particularly when they presented arguments  
11 on claims that did not survive screening.<sup>1</sup> As the Magistrate Judge correctly noted, "[i]n  
12 what can only be characterized as singular waste of judicial resources, defendants  
13 Cipriano, Fortner, and Taylor dedicate thirteen pages of their twenty-five page motion  
14 to claims the screening order dismissed." (Dkt. no. 70 at 7.) Accordingly, the Court  
15 denies the Officer Defendants' request to consider arguments that they failed to raise  
16 in their Motion or even reply brief.

17 The Magistrate Judge recommends denying summary judgment on the  
18 excessive force claim against Defendants Taylor and Fortner because they did not  
19 raise any arguments with respect to these two Defendants in their Motion, thus  
20 denying Plaintiff, who is proceeding *pro se*, the opportunity to respond. Because  
21 Defendants Taylor and Fortner did not properly assert their arguments to support their  
22 request for summary judgment, the Court declines to address their late asserted  
23 arguments in their objection. With respect to Cipriano, the Magistrate Judge

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24 <sup>1</sup>The Officer Defendants noted that the Magistrate Judge addressed the claims  
25 based upon the screening order entered after they made their appearance in this case.  
26 (Dkt. no. 72 at 4.) The fact that the screening order was issued before the Officer  
27 Defendants appeared in the case does not excuse their failure to address only the  
28 claims that survive screening. In fact, the Court is compelled to conduct a preliminary  
screening of Plaintiff's complaint, before a response is filed, to alleviate the need for  
Defendants to respond to claims that are not legally cognizable. See 28 U.S.C. §  
1915A(a).

1 recommends denying summary judgment because a genuine issue of material fact  
2 exists as to whether he is entitled to qualified immunity. While the Officer Defendants  
3 only argue qualified immunity for the first time in their reply brief, the Court will address  
4 their arguments because the Magistrate Judge did consider these arguments in  
5 making her recommendations.

6 Where a plaintiff has stated a valid cause of action under § 1983, government  
7 officials sued in their individual capacities may raise the affirmative defense of qualified  
8 immunity, which Capriano has invoked here. See *Spoklie v. Montana*, 411 F.3d 1051,  
9 1060 (9th Cir. 2005). To determine whether an individual officer is entitled to qualified  
10 immunity, a court must make a two-step inquiry: (1) whether the facts shown make out  
11 a violation of a constitutional right; and (2) if so, whether the constitutional right was  
12 clearly established as of the date of the alleged misconduct. *Pearson v. Callahan*, 555  
13 U.S. 223, 232 (2009) (citations omitted); *Saucier v. Katz*, 533 U.S. 194, 121 (2001);  
14 *Robinson v. Solano Cnty.*, 278 F.3d 1007, 1013 (9th Cir. 2002). The Supreme Court  
15 has instructed that district judges may use their discretion in deciding which qualified  
16 immunity prong to address first based on the circumstances of the case at issue. See  
17 *Pearson v. Callahan*, 555 U.S. 223 at 232, 236 (2009). The Court will address both  
18 prongs of this test.

19  
20 **1. Was Capriano's use of force unreasonable and in violation of Plaintiff's Fourth Amendment rights?**

21 A claim of excessive force during an arrest is analyzed under the Fourth  
22 Amendment's objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386,  
23 395-97 (1989). To determine whether the use of force by a law enforcement officer  
24 was excessive under the Fourth Amendment, a court must assess whether it was  
25 objectively reasonable "in light of the facts and circumstances confronting [the officer],  
26 without regard to their underlying intent or motivation." *Id.* at 397. "Determining  
27 whether the force used to effect a particular seizure is 'reasonable' under the Fourth  
28 Amendment requires a careful balancing of the nature and quality of the intrusion of

1 the individual's Fourth Amendment interests against the countervailing governmental  
2 interests at stake.” *Id.* at 396 (internal quotation marks omitted). In this analysis, the  
3 Court must consider the following factors: (1) the severity of the crime at issue; (2)  
4 whether the plaintiff posed an immediate threat to the safety of the officers or others;  
5 and (3) whether the plaintiff actively resisted arrest. *Id.*; see also *Arpin v. Santa Clara*  
6 *Valley Transp. Agency*, 261 F.3d 912, 921 (9th Cir. 2001). While these factors act as  
7 guidelines, “there are no per se rules in the Fourth Amendment excessive force  
8 context.” *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir.2011) (en banc).

9 The Ninth Circuit has repeatedly recognized that excessive force cases are  
10 rarely suited for summary judgment. “Because [the excessive force inquiry] nearly  
11 always requires a jury to sift through disputed factual contentions, and to draw  
12 inferences therefrom, we have held on many occasions that summary judgment or  
13 judgment as a matter of law in excessive force cases should be granted  
14 sparingly.” *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002); see also *Liston v.*  
15 *County of Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir. 1997) (as amended) (“We have  
16 held repeatedly that the reasonableness of force used is ordinarily a question of fact  
17 for the jury.”).

18 Plaintiff is permitted to proceed on his excessive force claim based on his  
19 allegations that on January 27, 2012, the Officer Defendants went to his apartment  
20 and he was “physically grabbed and pulled outside the apartment in his boxer shorts,  
21 in very cold weather” and he was “immediately handcuffed when he was snatched out  
22 of his apartment.” (Dkt. no. 4 at 5; dkt no. 5 at 5.) In his declaration, Plaintiff states that  
23 on the early morning hours of January 27, 2012, he was asleep in his bed wearing  
24 only a pair of boxer shorts when he heard “repeated banging” at his door. (Dkt. no. 66  
25 at 112.) He put on a pair of house slippers and after he realized the “the Metro police”  
26 was knocking on his door, the following occurred:

27 That I immediately opened the apartment door and was immediately  
28 grabbed by a metro police offer, who I learn[ed] at a later date was  
Officer Cipriano, who grabbed my wrist, pulled me out of the apartment

1 while twisting my wrist to turn my body away from him so he could  
2 handcuff me, and during this pulling of my wrist, and twisting my arm at  
3 the same time and bending it upward, caused a great amount of pain to  
me and could have broken my shoulder.  
(*Id.*)

4 The Officer Defendants argue that Plaintiff did not testify either at his criminal  
5 trial or his deposition in this case that he experienced any pain when Cipriano  
6 handcuffed him. (Dkt. no. 72 at 4-5.) However, as the Officer Defendants  
7 acknowledge, the absence of physical injury is not dispositive. (*Id.*, citing *Wilkins v.*  
8 *Gaddy*, 559 U.S. 34, 36-37 (2010).)

9 The Officer Defendants reiterated the general argument that an officer's use of  
10 "empty hand techniques to put a suspect into position to be handcuffed and to apply  
11 the cuffs" does not amount to excessive force absent unusual circumstances. (Dkt. no.  
12 72.) However, Plaintiff's declaration disputes the Officer Defendants' contention that  
13 the sum total of the force use involved placing Plaintiff into position to be handcuffed.  
14 Plaintiff asserts that Capriano twisted his wrist "to turn [his] body away from him so  
15 [Capriano] could handcuff [Plaintiff], and during this pulling of [Plaintiff's] wrist, and  
16 twisting [his] arm at the same time and bending it upward." (Dkt. no. 66 at 112.)  
17 Plaintiff contends that he had immediately answered the door when he realized who  
18 was knocking during the early morning hours and all he had on was his boxer shorts.  
19 (*Id.*) There is no evidence that Plaintiff posed any safety risk when he answered his  
20 door wearing only his boxer shorts, or that he attempted to resist arrest. Viewing this  
21 evidence and drawing all inferences in the light most favorable to Plaintiff, a rational  
22 trier of fact could find that Capriano's use of force in handcuffing Plaintiff — by twisting  
23 Plaintiff's body, pulling Plaintiff's wrist and his arm and bending it upward to handcuff  
24 him when Plaintiff was not resisting arrest or present any apparent threat as he stood  
25 at his door in his boxer shorts — was unreasonable.

26 The Officer Defendants also cite to Plaintiff's extensive criminal history and  
27 subsequent conviction of the charge for which he was arrested and sentenced as a  
28 habitual criminal to a life sentence to suggest that the force use — "a more dynamic



1 handcuffing approach” — is reasonable. (Dkt. no. 72 at 14.) While the nature of the  
2 crime at issue and whether a plaintiff posed an immediate threat to the safety of the  
3 officers or others are factors that should be considered, the Officer Defendants’  
4 argument that one’s criminal history and subsequent conviction should be considered  
5 is tenuous. They fail to offer any authority to support their argument. In any event, the  
6 Court disagrees that the force to be applied in effectuating an arrest should be varied  
7 depending on one’s status as a “habitual criminal.” Moreover, there is no evidence to  
8 suggest that Capriano was aware of Plaintiff’s criminal history, nor is there any nexus  
9 between the reasonableness of the force used and a subsequent conviction of the  
10 charge for which Plaintiff was arrested.

11 The Court agrees with the Magistrate Judge that a material issue of fact exists  
12 as to whether Capriano used an unreasonable amount of force in handcuffing Plaintiff  
13 and as a result violated his Fourth Amendment rights.

## 14 **2. Was the Fourth Amendment Violation Clearly Established?**

15 The second prong of a qualified immunity analysis requires the Court to  
16 determine whether the law, as it existed at the time of the incident, was clearly  
17 established. “A [g]overnment official’s conduct violates clearly established law when, at  
18 the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that  
19 every reasonable official would have understood that what he is doing violates that  
20 right.” *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011) (quotation marks and citation  
21 omitted). The Supreme Court has cautioned courts “not [to] define clearly established  
22 law at a high level of generality.” *Id.* at 2084; *see also City & Cnty. of San Francisco v.*  
23 *Sheehan*, —U.S. —, —, 135 S.Ct. 1765 (2015). Yet, it is “clear that officials can  
24 still be on notice that their conduct violates established law even in novel factual  
25 circumstances.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also Deorle v.*  
26 *Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 1997) (“Otherwise, officers would escape  
27 responsibility for the most egregious forms of conduct simply because there was no  
28 case on all fours prohibiting that particular manifestation of unconstitutional conduct.”).



1 In evaluating the second prong, the Court must ask whether a reasonable  
2 police officer would have understood that he may not use excessive force in  
3 handcuffing a suspect in a manner to cause pain — as he did here where immediately  
4 upon seeing the suspect, the officer twisted the suspect's body, pulling his wrist and  
5 arm and bending his arm upward to handcuff him — when the suspect was not  
6 resisting arrest or posing any apparent security threat. The law is clearly established  
7 that such force may not be used under the circumstances presented here.

8 The Magistrate Judge relied on three Ninth Circuit Court of Appeals' decisions  
9 involving abusive handcuffing in determining that the law is clearly established:  
10 *Hansen v. Black*, 885 F.2d 642 (9th Cir. 1989); *Meredith v. Erath*, 342 F.3d 1057, 1060  
11 (9th Cir. 2003); and *Wall v. Cnty. of Orange*, 364 F.3d 1107 (9th Cir. 2004). (Dkt. no.  
12 70 at 9.) These cases are particularly instructive on the contours of the law governing  
13 placement of handcuffs in connection with an arrest in the absence of any evidence  
14 that the person placed in restraint resisted arrest or presented any apparent threat. In  
15 *Hansen*, police officers had followed footprints in the snow from a gas station that was  
16 robbed to Hansen's residence when she emerged carrying plastic trash bags and  
17 walked to the street where a trash truck had stopped to pick up trash. 885 F.2d at 634.  
18 The parties offered conflicting versions of what happened next, but Hansen alleged  
19 that the officers told her to leave the trash bags on the street, warned her that she  
20 would be arrested if she interfered with their attempt to remove the trash from the  
21 truck, and she complied. According to Hansen, "when Hansen turned to go into her  
22 garage, one of the officers came over and handcuffed her." *Id.* at 645. Medical records  
23 showed that Hansen was treated for injuries as a result of the arrest, "she had bruises  
24 on her arm and wrist and under her upper arm" and had "complained of pain in her  
25 little finger and upper arm." *Id.* The court affirmed the denial of summary judgment,  
26 finding that a factual issue exists as to whether the officers used excessive force in  
27 handcuffing Hansen. *Id.* In *Meredith*, the force use involved an IRS agent grabbing  
28 Meredith by the arms, "forcibly threw her to the ground, and twisting her arms, placed

handcuffs on her wrists.” 342 F.3d at 1060. The court relied on *Hansen* to find that it was clearly established that the amount of force used in handcuffing the plaintiff was excessive. *Id.* at 1061. Finally, in *Wall*, the court relied in part on *Meredith* for the proposition that “overly tight handcuffing can constitute excessive force” in finding that continuing restraint by handcuffs that were tight and that resulted in repeated requests to “loosen the handcuffs” violated clearly established constitutional rights to be free of excessive force. 364 F.3d at 1109-10, 1112.

It is well established through *Hansen*, *Meredith* and *Wall* that an officer cannot use more force than necessary to restrain a suspect. Here, accepting Plaintiff’s version of the facts and drawing all reasonable inferences in his favor, Capriano did just that. Capriano twisted Plaintiff’s body, pulling his wrist and arm and bending his arm upward to handcuff him when Plaintiff was not resisting arrest or posing any apparent security risks. (Dkt. no. 66 at 112.) A reasonable officer, having reviewed *Hansen*, *Meredith* and *Wall*, would not believe it was reasonable to apply more force than necessary to place Plaintiff in handcuffs under these circumstances.<sup>2</sup>

In sum, the Court agrees with the Magistrate Judge and will adopt the recommendation to deny summary judgment to the Officer Defendants.

#### **B. Molinaro’s Motion**

Plaintiff’s claim against Molinaro is for deliberate indifference to his serious medical conditions. This claim requires a plaintiff to satisfy “an objective standard — that the deprivation was serious enough to constitute cruel and unusual punishment —

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<sup>2</sup>The Officer Defendants cite to this Court’s earlier decision in *Lefever v. Nicholson*, case no. 2:10-cv-01917-MMD-PAL, 2013 WL 1068817 (D. Nev. March 2013), where the Court summarized Ninth Circuit case law examining handcuffing. In *Lefever*, the tight handcuffs were placed on Lefever for 8 to 15 seconds, the improperly fastened handcuffs were release upon Lefever’s request and no other forms of violence where inflicted. *Id.* at \*4. The Court found that the Ninth Circuit recognizes that the right to be free from excessive force in the form of tight handcuffing was clearly established at the time of the incident, and declined to grant summary judgment as to the question of qualified immunity despite being faced with a close question. *Id.* See *Wall*, 364 F.3d at 1112 (9th Cir. 2004). This case is distinguishable both on the facts and on the Court’s determination that the circumstances of the handcuffing here do not present a close call as in *Lefever*.

1 and [also] a subjective standard — deliberate indifference.” *Colwell v. Bannister*, 763  
2 F.3d 1060, 1066 (9th Cir. 2014) (quoting *Snow v. McDaniel*, 681 F.3d 978, 985 (9th  
3 Cir. 2012)) (internal citations and quotation marks omitted). “A prison official is  
4 deliberately indifferent under the subjective element of the test only if the official  
5 ‘knows of and disregards an excessive risk to inmate health and safety.’” *Id.* (quoting  
6 *Toguchi v. Chung*, 391 F.3d 1050, 1057 (9th Cir. 2004)).

7 The Magistrate Judge recommends granting Molinaro’s motion because Plaintiff  
8 has failed to provide evidence to create a material issue of fact that Molinaro knew of  
9 Plaintiff’s serious medical needs. (Dkt. no. 70 at 13.) In his objection, Plaintiff argues  
10 that he has presented evidence that, viewed in the light most favorable to Plaintiff as  
11 the non-moving party, may lead a reasonable jury to find that Molinaro was made  
12 aware of his serious medical conditions. (Dkt. no. 71.) In particular, Plaintiff cites to  
13 several grievances that were directed to “Health Services Administrator” and would  
14 have been submitted to her pursuant to CCDC’s policy to enable inmates to direct  
15 grievances to a specific department or staff member; and he reiterated that in  
16 connection with his July 30, 2012, grievance, Molinaro introduced herself to him as the  
17 Health Services Administrator and “was there to see me because of all the grievances  
18 I had filed.” (*Id.* at 2-3.) The Court agrees with the Magistrate Judge that Plaintiff has  
19 failed to offer sufficient evidence to create a triable issue of fact that Molinaro was  
20 aware of his medical needs.

21 Plaintiff relies on several grievances that were submitted to the attention of the  
22 “Health Services Administrator” and his contention that in connection with his July 30,  
23 2012, grievance, Molinaro “introduced herself to [him] as the Health Service  
24 Administrator, and told me that she was there to see me because of all the grievances  
25 that I had filed.” (Dkt. no. 71 at 2-3; Exhs. 7, 10, 13, 15, 17 (dkt. no. 66 at 27, 34-35,  
26 41, 46, 50.)) Of the grievances that Plaintiff identifies, Molinaro responded to one —  
27 the grievance dated April 30, 2011 (Exh. 7, dkt. no. 66 at 27). That grievance stated  
28 that Plaintiff had submitted a medical kite for treatment of his eye condition, had

1 requested to be examined and had mentioned that he was treated for “glaucoma”  
2 while at High Desert State Prison. (*Id.*) However, the grievance involved the progress  
3 of obtaining the release of medical records from the Nevada Department of  
4 Corrections (“NDOC”). (*Id.*) Molinaro responded that the records had not been  
5 received and directed Plaintiff to complete a release of information. (*Id.*) Viewed in the  
6 light most favorable to Plaintiff, the information in the grievance — a statement of his  
7 treatment while in NDOC custody to explain the reason for inquiring about the release  
8 of medical records from NDOC — does not support Plaintiff’s contention that Molinaro  
9 knew of his serious medical needs.

10 In support of her motion, Molinaro offered her declaration where she states that  
11 she did not have any interaction with Plaintiff other than to respond to his April 30,  
12 2011, grievance, and explains that she did not review most of the kites that were filed  
13 and responding to the kites was not part of her general job duties. (Dkt. no. 59-5 at 2.)  
14 She pointed out that Plaintiff’s comment in an August 2012 grievance shows he had  
15 not met her by that time: “I was previously told that the name of the person in charge  
16 of health services is Melody. So I say hello to you Ms. Melody.” (Dkt. no 59-3 at 180.)  
17 She also offered internal notes showing that Nurse Debra Toti posted a note of her  
18 conversation with Plaintiff on July 30, 2012. (*Id.* at 68.) There is no dispute that  
19 Molinaro did not respond to the July 30, 2012 grievance. (Dkt. no. 66 at 39.) In light of  
20 these undisputed evidence, Plaintiff’s contention that Molinaro had introduced herself  
21 as the Health Service Administrator in connection with his July 30, 2012, grievance,  
22 and was doing so because of the grievances that he had filed, is not sufficient to  
23 create a factual dispute.

24 The Court will therefore adopt the Magistrate Judge’s recommendation to grant  
25 summary judgment in favor of Molinaro.

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